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INTRODUZIONE A SEXY DRESSING

Maria Rosaria Marella: Sexy Dressing is not outdated at all. Unfortunately femicides and male violence on women are still there and possibly increased. The good news is that the feminist movement is revived all over the world and ready to fight back. In your article you say that you would not define yourself as 'feminist' and assume the standpoint of the white upper middle class straight man. However we all know that your scholarship has influenced many prominent feminist theorists like Mary Joe Frug, to whom the essay is dedicated, Fran Olsen and Kim Crenshaw. What are the weight and role of feminism in your agenda as a leftist intellectual and as a jurist? Would you like to spend some words also on the recent fresh start of American feminism?

DK: I am particularly happy that this translation of Sexy Dressing is appearing in Italy now. Although the essay was written 25 years ago, it has a certain contemporaneity because of the existence in this moment of a new wave of feminist agitation against sexual harassment and sexual abuse by men, and this is an international phenomenon. For example in Argentina there is the Ni una Menos movement, and even in the United States where it is often be said that there has been a long term decline of the feminist movement, the ME TOO movement and the campaign for Hilary Clinton really produced a feminist revival and then the very strong reaction to Donald Trump in the Women's March after his election.

So the issues of harassment and abuse discussed in the essay are very timely. The approach of the essay is to analyze the variety of ways in which abuse affects all aspects of the relations between men and women. And particularly, it makes the strong assertion that abuse affects the relations between non-abusive men and women who are not being abused. The argument is that the question of abuse is not just about the relations between an abuser and a victim: the question of abuse implicates the whole structure of relations between the sexes whether the participants are abuser or victim themselves. This turn owes a great debt to the work of Catherine MacKinnon.

A second way in which the essay is quite different from the norm of even the best feminist work and one of the reasons why the essay is controversial is the choice to juxtapose the topic of sexual abuse with the topic of sexy dressing. This may be less shocking in Italy than in the United States, but in the United States, according to the mainstream feminist culture, the overt exhibitionism of sexy dress tends to be regarded as a clear example of the sexism of the general culture. So sexy

dressing by women is understood in the feminist mainstream as a symptom of their oppression. To a degree, which seems to me not necessarily true of the northern Mediterranean and Latin American universes. So in the United States there is a question of whether an essay could be characterized as in any way sympathetic to feminism if it claimed - as this essay does - that while there needs to be a critique of sexy dressing it is possible to affirm its value as well.

The essay does both: it offers a critique of sexy dressing as a sexist practice or a patriarchal practice and a defense of sexy dressing as a potentially liberatory practice. In the US this raises immediately the question of whether I am claiming to speak as a feminist or as an enemy of feminism, or whether I think I'm speaking from a universal neutral position of objective observation. So let me say something about the question whether I am writing 'as a feminist'. As you say I do not define myself as a feminist and I don't think I'm writing as a feminist and here is why.

What I say in the article is that I do not define myself as a feminist or as a black nationalist because what I like about those movements and what inspires my solidarity with them is precisely that they are movements *of* people who are women and *of* people who are of color. I would describe myself in a very general way as a leftist, as a radical, as someone to the left of the American progressive mainstream. As a radical, my underlying commitment is to liberation, understood as a category that is more abstract than and transcends categories like class and race and gender but includes them. Liberation for me is about class and race and gender and all the other differences marked by oppression, but I do not want to speak as though I know intuitively and at firsthand what it feels like to be a woman or a person of color and I certainly don't want speak in a way that sounds as though I think I can speak *for* them.

My alternative has been to acknowledge my own identity as a straight white upper middle class male and develop a politics that starts from that compromised situation. It is crucial to my strategy that we have been and are powerful, a big segment of the 'ruling class.'" A first principle is to accept a share of collective guilt by association (!!) for our wrongs past and present against women and people of color. The guilt imposes an obligation to activism of some unspecified kind. But what kind is up to us and the choice must not be delegated to our victims.

A second principle is that we need to have a politics of responsibility for life within the larger group of men of which we are a subgroup. As upper middle class white people our commitment to justice between classes needs to be as firm as to racial and gender justice. And as straight men we have to have a similar commitment against homophobia.

A third principle is to militate for justice as between upper middle class white men. This may be the most disconcerting element in the program. Within the world of upper middle class white men, there are a million micropolitical issues of hierarchy within large and small subgroups. There is and has been forever the issue of antisemitism. And (this is key) I am for an egalitarian attack on the way tough guys who may or may not be the boss dominate social life including work meetings and informal after-work hang-outs, subtly humiliating other white upper middle class men who are lower on the totem pole by interrupting them, marginalizing them in multiple ways that

exemplify and affirm macho male culture vs. the masculine culture that is softer and more feminized. I am a partisan of the more feminized and soft version of upper middle class white male culture. At its most extreme it's Nerd Culture versus Prep/Frat/Jock Culture.

The fourth principle is that it is about left crosscutting (intersectional) alliances based situationally on ideal (ideological) and more material interests rather than more deeply integrated formations. In this essay, for example, I argue for a male interest in curbing sexual abuse because that might liberate women who wanted to, to dress more sexily. The principle of alliance follows from the absence of overarching theories of what liberation is and how to achieve it and from the extreme fragmentation of the progressive movement. And although there is no necessary contradiction between the elements of the program, conflicts requiring balancing are always at least potentially present, making unequivocal a priori commitment to any one strand impossible.

MRM: What was the reaction of unitedstatesean feminists to SD? To my knowledge it was found so extreme and even sexist to provoke an actual disgust among American feminists. On the other hand a radical thinker committed to the legal regulation of sex and sexuality such as Janet Halley¹ has defined SD as the first essay in queer *legal* theory.

DK: I think it is true that many American feminists had a strong negative reaction to the essay, though very little of that was expressed in print. Trying to figure out the bases of the negative reaction led me to extend my own thinking about the particular position of alliance I was talking about in my answer to the last question. I think this essay provokes not because of the way at an abstract level it tries to relate sexy dressing to sexual abuse but because of the voice in which I wrote it, a voice that very aggressively disclaims the notion that I'm speaking from an objective or universal or ungendered point of view. Claiming to speak "for" or "as" your identity has been the prerogative of feminists, in American culture; it is women who say: "I speak as a woman" and often claim superior knowledge of what women as women think and feel. White men are attacked rightly or wrongly for claiming to speak from a neutral universalist "the truth, and nothing else wherever that may lead" point of view.

So the first point is that by endlessly reiterating my 'subject position' I am appropriating the rhetorical tools of the other side and doing it in spite of the fact that the straight white upper middle class male point of view, in so much as it is recognized in mainstream progressive discourse, is in a sense a shamed or discredited one. The implicit claim for recognition of a progressive version of this particular subject position was and was intended to be disconcerting

Second, from within this de-universalized white straight middle class male perspective I'm speaking about sexual feelings and reactions to women, which are not subjected to the censorship imposed by liberal mainstream sexual culture. I'm presenting and speaking without shame of reactions to women as objects of sexual desire and also sexual antagonism.

As the title indicates, the essay takes seriously the notion of the eroticization or domination, a Mackinnon insight almost never mentioned by mainstream feminists. It actually provides, as part

¹ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2008).

of the critique of `sexy dress, multiple examples of how it works in daily life. That aspect of MacKinnon is outside the norms of liberal sexual discourse as promoted by mainstream feminism.

I'm claiming as a member of the straight white upper middle class identity group the identitarian privilege of describing our sexual selves, including our sometimes antagonistic relations with women in general and feminists in particular and our experiences as part of the audience for [women's dress choices as it plays into straight male erotic life](#). The premise is that men and women are participating from opposite sides in a dialogue in which women's dress is a form of cultural expression with men sometimes part of the audience. In this interaction, as i describe it from my straight white middle class male point of view, women sometimes dress so as to elicit male desire (often ambivalent desire) and sometimes derive power from doing so. Although I am not at all sure I am right about this, my intuition is that many mainstream American feminists view sexy dressing with these effects as a symptom of women's disempowerment rather than the reverse, and as ethically unattractive.

There is a fourth element, the text has been described to me (but only by a few women readers) as having an element of erotic provocation, because it attempts quite elaborate descriptions of what sexy dressing is and what are the experiences that it evokes, and those passages are themselves sexually explicit. Descriptions of sexuality from the male point of view are experienced I think by many mainstream feminists as bordering on pornography and so intrinsically offensive.

Having said all that about my relationship to feminism as a movement, I need to add a word about feminist theory. I see feminism in that sense, and particularly radical feminist theory, as an enormously important contribution to critical theory in general and I would describe myself as a convinced believer in many elements of that contribution. And I would be delighted if any of the analyses on my essay were "received" by feminist theorist as contributions, however minor, to their project.

So, Maria Rosaria, it goes without saying that I was thrilled by your remark that the piece was better received by queer theorists, and was even described by Janet Halley as the first work of queer legal theory. Let me ask you, since I know you agree that it's queer theoretical what does that mean to you? Why?

MRM: I say something specific, which is that one idea is that sex produces politics, but this happens not necessarily within identitarian frameworks and this is what you say.

DK; I think this is a good summary of what I think is queer theoretical too.

MRM: And then I say that your legal realist objection, starting from the eroticization of domination, is very queer. There is no regime, not either hetero-normativity or identity-based regime, which can be totally rationalized, totalitarian, closed without fissures or fractures. So this is another point concerning sexy dressing which qualifies your piece as a work within queer legal theory in my opinion.

4. MRM: Your straight white middle-class point of view on sexual abuse and SD comes to light through the method of analysis you choose: Cost-benefit analysis of sexual abuse and sexy dressing regulation. I think that the possibility of a pro-sex point of view is very welcome in Italy where sexual phobic politics has never been part of the feminist agenda even in the Nineties. However, CBA here runs the risk of being perceived as shocking because too cold, 'scientific', and even mocking to some extent.

DK: This is an important question, I think I need to clarify right away for the worried reader that CBA is just one of the techniques that I use to understand and frame both sexual abuse and sexy dressing. Sociology and social psychology and psychoanalysis and literary theory are all important parts of the argument. But I think that CBA has a lot of important virtues which derive from the fact that it is the opposite of a cold method and certainly in no way a mocking on

To clarify, first of all, Cost-benefit analysis, as I employ it in the essay, is not efficiency analysis. You may associate CBA with the normative project of trying to determine and advocate for legal rules that are efficient, and this has nothing to do with that. You may associate it with the idea of either quantitative or monetary evaluation in order to make decisions, and it has nothing to do with that either. CBA, as I use it here is, so to speak, the softest version of the technique. It just consists in saying this: if we are trying to figure out what the consequences of a legal rule will be, it is very important to know how the people affected by it will feel about it, whether they will like it or not like it. Whether they will try to avoid it or embrace it, whether it will lead them, given desires and preferences, to do things we regard as good or bad.

It is a tool of prediction. If we are going to institute a regime let's say of compulsory imprisonment of domestic abusers we need to know what different categories of women will see, as the costs and benefits to them, of the imprisonment of their husbands. So if some women who are victims of some form of domestic violence nonetheless perceive the imprisonment of their husbands as a harm, as a cost to them and not as a benefit, it would obviously be a good thing to know before we decide on some form of compulsory imprisonment.

This is the first sense in which CBA is vital. the second is that if we are going to make a normative decision whether to impose compulsory imprisonment, we can approach it in a purely moralistic way or a Kantian way and see it as a retributive sanction against a man, who did something bad, with the sanction strictly determined by the nature of the offense. But there is and has always been a strong argument that we shouldn't be simply moralistic and absolutist about the criminal sanction and we ought to ask whether women will benefit or be harmed by compulsory imprisonment, and we could even ask a question like how high will the cost be to men. Along with the other obvious question of how much deterrent effect we can expect.

Not being a Kantian, I utterly reject the idea that the punitive sanction is simply a retributive response to the doing of a moral wrong. Like most people, I think that the criminal sanction is a very complicated, dangerous and subtle thing, that has to be applied taking into account all the many many consequences of criminalizing something. So CBA seems indispensable.

I want to add that the accusation of coldness is valid if you are talking about market value based efficiency as the single standard, it is valid if you are talking about evaluation that is strictly in money terms or understood as quantitative. But when we are talking about CBA as trying to determine the feelings and preferences and likely reactions of the people affected by a norm, it's the opposite of cold. For example, it's warmer than moralism, which assumes that there are absolute standards for assessing conduct, which everyone must agree with. CBA presupposes the existence of many different ways to experience the costs and benefits of a norm.

It has the possibility of incorporating into the analysis a post identitarian assessment of different reactions to the norm by actors with different dispositions. CBA permits and may require disaggregating. Now let me give an example from the book. If we are talking about sexy dressing as a practice which is open to criticism from various points of view, including a feminist position that sexy dressing is self-objectification for the pleasure of men, and if that position justifies feminist informal criticism and sanctions of women for sexy dressing, which is the case in the United States, and not the case in Italy, what might the consequences be? Well, some women, who enjoy sexy dress, and experience it as a mode of power would lose. Other women who dress sexily only because the norm requires it and not because they want to, will gain. And so on through all the possible attitudes of the people affected.

A final serious misunderstanding of CBA in the form I use here is that it can settle normative questions about law. The costs and benefits are to particular individuals or groups. The normative decision always depends on how the decision maker chooses to balance the interests of these different people when they conflict and how to count costs and benefits whose social and/or moral quality is controversial. In other words, CBA, in this restricted form, can clarify but not resolve normative questions. At the end, political/ethical judgment is inescapable.

3. MRM: One of the reasons why we have chosen SD to inaugurate this book series is its interdisciplinarity. In Italy the interdisciplinary approach to legal issues is à la mode on the one hand as far as it contrasts the most obstinate and closed formalism of the mainstream, on the other it is perceived as a divertissement for bored law professors. What is the role of interdisciplinarity in your work as a jurist and in SD in particular?

DK: I think that in the United States in the legal academic milieu that I come from, a sharp contrast between real law or normal law or jurist law and interdisciplinary work is no longer characteristic. I believe it's a fair generalization that among law professors, particularly law professors who are part of the legal elite, it is understood that jurists need, in doing dottrina, to orient dottrina both to normative positions that are external to law and in terms of assessments of practical consequences of legal norms that are based on social sciences.

The notion of a strict autonomy of the legal as a closed normative system is no longer the dominant legal consciousness in the United States. What that means is that to a significant extent, professional jurists assess legal work in terms of the sophistication and accuracy with which it is

normatively oriented not internally but externally and the extent to which it effectively deploys the tools of social scientific study. And that is a very large difference between Italy and the United States.

Sexy Dressing however is an extreme outlier in terms of the current norms of American legal academic work, and it is also an outlier in terms of my own work, as a normal American legal academic. As a normie, I have used in my work a good deal of economic analysis as a way to assess legal rules and I've deployed other disciplines, notably psychology and sociology, in making my fully doctrinal arguments for outcomes. Say, about the extent to which low-income homebuyers should be protected in the terms of their mortgages when they borrow from commercial banks.

There, I see myself as making strictly doctrinal arguments based on legal materials, precedents, cases, statutes combined with an economic and sociological analysis of the consequences of one norm or another. This is Cost-benefit analysis of the kind I was talking about in my answer to the last question.

Sexy Dressing is in part a work of this kind. It does offer an analysis both of why there should be stronger restrictions on sexual abuse and what the consequences are likely to be and in that sense it is normally doctrinal, in the American style of policy analysis. What that means is that I tried in the piece to describe legal regimes with technical accuracy and treat them systematically, as well as mustering, in the normal American interdisciplinary style, social scientific data and methods to support the argument.

But in this article, and in some of my other work, I also tried to do interdisciplinarity in a quite different way. The argument is not, as it was in the case of protecting low-income homebuyers in the terms of their mortgages, restricted to the economic and sociological. It is an attempt at a study of some actual practices of sexual abuse and sexy dressing and their legal context, treating them as manifestations of culture and of its internal conflicts or contradictions. In that sense I am perfectly happy to be told that it is the work of a bored law professor, in the sense that I am trying to do something that normal American law professors don't do.

This is quite a bit more than interdisciplinarity as an integral part of a good legal argument,, because the piece is also inspired by works whose ambition is to vividly evoke the day to day practices of normal lay people both in relation to violence and to sexy dressing or sex in general. It in effect is a little essay on popular sexuality as well as an argument about restricting male violence.

Another aspect of the article which is important to me, and I'm curious how Italian readers will react to it, is that it is a piece of literature about sex, in the tradition of literary works that discuss sex in an intentionally shocking, and quasi-confessional way. Rousseau's *Confessions*, volume I, for the reader who is familiar with that work, contains a brilliant discussion of masturbation that inspired what I wrote here. Of course, what produces a shock, at least for some readers, is not the subject matter in itself, but its appearance in a law review article, a literary genre with quite

different and strict conventions. The hope was to create surprising effects through relatively minor deviations from the rigid norms of a familiar form.

5. MRM: In che misura il tuo lavoro critico sul diritto ha inciso sulla tua analisi dell'abuso sessuale e della regolazione sociale dell'abbigliamento sexy?

DK: Sexy Dressing is very much an example of the kind of critical theory I have specialized in and in particular it deploys and develops some characteristic theory "moves" of practitioners of American critical legal studies. These are influenced both by American legal realist interdisciplinarity and by European social theory. The crucial move in this piece is to apply "the background rules thesis." In this understanding, rules of the legal order are the rules of the game of the struggle over material and ideal stakes between social groups whether it is men and women, or black and white, or of social classes, or gay and straight when their interests conflict. When we try to figure out which of the rules are important causes of a given distributive outcome between conflicting groups the natural tendency is to focus on rules specific to the particular conflict.

The background rules thesis is that very general norms of the overall legal order are typically simply presupposed when addressing causal questions. The basic rules of property and contract law, some basic rules of the criminal justice system, and some public law rules like those governing the distribution of powers in the federal system are often crucial to the outcome, in the sense that even small changes in those rules would have major distributive impacts. Operating a foreground background flip or a typical duck rabbit reinterpretation of the ambiguous image has the effect of bringing out the sense that the outcome is "system dependent" rather than a function of the idiosyncratic details of the conflict.

The sexy dressing article begins by applying this proposition to the laws governing sexual abuse. It argues that the background rules about domestic battery, sexual harassment and rape constitute a "tolerated residuum" of abuse that is a powerful conditioner of bargaining between men and women in many situations including bargaining between men who don't abuse and women who have not been abused. I'm not going to develop that any further, because I covered it in my answer to your first question.

The background rules idea is indebted to Marx and to Robert Hale. For Marx, the commodification of labor power is a legal background rule that decisively structures the bargaining relationship between workers and owners. For Hale, the absence of legal duties to others on the side of the owners of the means of production performs the same occluded function.

6. MRM: e come no to the end. This is my last question. Your work as you say is highly technical and juridical, but on the other hand in your work there is an evocation of popular culture and so it is novelistic. So do you think that your essay sexy dressing is a contribution to critical thinking and in what way? And do you think that it will be of interest for people who are not legally trained or jurists? Or to better understand, is it of interest for people who think of themselves as critical social theory people?

I do think the essay is a modest contribution to a particular kind of critical thinking. I have to acknowledge that it has had little up take of any kind among audiences without legal training, including ones interested in critical thinking about gender. As far as my ambition for the piece is concerned, I should start by saying that in this piece and in my other work I don't start from commitment to any of the many schools or varieties of critical theory, intending to apply or develop them. I begin with a cathexis to an object. An object of attention and study that I long to, in some sense, understand and appropriate. That for me in general is the legal order, is the problem and phenomenon of authority, the idea of judgment, the pathos of punishment. Those are things that are there for me pre-theoretically and that I have been interested in since I was a small child. Likewise for sex. I don't start out with a theory and think that I will apply it to sex. I start out interested in sex as a social phenomenon, pre-theoretically. The impulse is to find ways to understand it as something that both engages and disturbs me.

But I am also fascinated by and envious of the works of the great characters of critical social theory and for me that means first of all Freud, Marx, Sartre and Weber. These are for me foundational people, along with (in order of first exposure). Levi Strauss, Marcuse, Nietzsche, Hegel, Foucault and Saussure. I've been reading them in bits and pieces since adolescence, without, as is true for Americans of my generation, any formal academic exposure (except for a little Weber in college). I am one of their followers, admirers, and enthusiastic students. I'm glad when I think my writing shows their influence.

I see myself as an appropriator for use. The appropriations are in the mode of what Levi Strauss calls *bricolage*, which means that, when I am working on my object, I take advantage of bits and pieces of their work guided intuitively by a sense of what will be useful for the portrayal. That is very different from understanding myself as a person who is formulating a critical social theory, that will illuminate law and sex, among things, when correctly "applied."

That is not my ambition. But that is not the end of the story. I was born in 1942 so that in my youth a good number of my influencers, along with numerous pretenders to that status who I hadn't read or dismissed, were still alive and active. I saw myself as a person working just beyond the outer limits of a living disciplinary community of critical social theorists located geographically and culturally in Western Europe, with zero American presence. That community was so far away that we weren't even in its provinces. There in the metropole I imagined people like Sartre and Marcuse and Foucault competitively originating new totalizations that we were free to cannibalize in any way we wanted. I didn't and don't imagine that I am or will become one of them. I do not even aspire to be one of them though so long as giants walked the earth it was hard to avoid the narcissistic fantasy of being somehow discovered and inducted. So what would be a more realistic aspiration? to develop myself bits or pieces or routines, limited analytic contributions that could be appropriated the way I have appropriated bits and pieces from the great models.

The goal would be that perhaps a person who is doing semiotics of rock and roll would find, inspired or just encouraged by Sexy Dressing, a way to use some version of the legal background rules analytic described earlier or the rules/standards dialectic from very long ago as part of a left critique. The aspiration is to create works that respond to the cathexis of the object, evoking it

effectively, while in the process developing and deploying legal analytics that while not part of an old or new totalizing theory turn out to be bits and piece of theory for another person's *bricolage*. That's the limit of the nonetheless grandiose ambition here.